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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-741

MY STORE, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY TO MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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STATEMENT.

This Reply Brief is filed pursuant to paragraph 4 of Rule 24 of the Rules of this Court (USCA Title 28, Supreme Court Rules, p. 41), because the Memorandum filed with this Court has raised arguments never before urged in this proceeding, and never before mentioned by either the National Labor Relations Board or the United States Court of Appeals for the Seventh Circuit in any of its orders in this litigation.

ARGUMENT.

For the first time during the entire course of this litigation we have an admission from the Board that 1963 preceded 1965, and that offers of reinstatement made in 1963 "obviously could not be held to be made in contempt of subsequently issued decrees." (Cf., p. 4 Board Memorandum in Opposition.)

The fact of the matter is, however, that it obviously was so held in three separate orders of the Court of Appeals for the Seventh Circuit (Exhibit A to Petition, pp. 3, 4; Exhibit B, p. A. 8; Exhibit H, pp. A. 37, 38), and is reiterated in two separate orders of the Board itself. (Cf., Exhibit D to Petition, p. A. 14; Appendix to Board Memorandum in Opposition, p. 8.) These obvious distortions of fact and law are spread upon the record time after time for all to see—and wonder about.

Now at this time the Board instead of attempting to change the calendar as it has consistently done previously, seeks to change the orders of the Court of Appeals by telling this Court what the Court of Appeals really meant. This is what the Court said:

> "We hold that the offers of reinstatement made by Respondent were not valid and that the offers were made wilfully and contumaciously with knowledge that they were not in compliance with the Board's order of May 25, 1964, enforced by the Decree of this court entered July 6, 1965." (Exhibit B to Petition, p. A. 8.)

This is what the Board said:

> ". . . It (the rule in Southwestern Pipe and O'Daniel Oldsmobile) is clearly inapplicable to a situation where, as here, a court has found that Respondent made such staggered offers of reinstatement 'wilfully and contumaciously with knowledge that they were not in compliance' with the Board's court approved

order." (Exhibit to Board Memorandum in Opposition, p. 8.)

The same position is reiterated by the Court of Appeals in its opinion dated September 14, 1972. (Exhibit H to Petition, pp. A. 37, 37, 39.)

An attempt at this time to predicate contempt on an assertion that "The Court of Appeals really meant that Petitioner had wrongfully continued to rest on the original unlawful offers" only compounds the errors committed. The record shows that Petitioner in fact urged the Board to adjudicate the entire question of reinstatement and back pay in the customary manner provided in the Act by way of a back pay specification. Inexplicably, however, the Board after debating the matter for nine months decided on a punitive course by way of a petition for adjudication in civil contempt. A fact finder, who was the Court's own Master in Chancery to whom the bona fides and validity of these offers was referred, after exhaustive hearings concluded that the offers were made in good faith and in the form and manner required by good business judgment, and were made without any animus toward the Union. (Cf., Petition, pp. 8-9.) This should have concluded the matter once and for all.[1] The fact that it didn't will remain one of the mysteries of the age.

It is Hornbook law that a "contempt decree must be clear and specifically definite and concise as to what actions are contemptuous." The Supreme Court has repeatedly

1. In *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2nd Cir. 1945), Judge Learned Hand stated:

> "... whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that *they 'must be treated as unassailable.' ... and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed 'unassailable,' except in the most exceptional cases.*" (at page 433) (Emphasis supplied.)

refused to enforce contempt decrees that are vague[2] and based on insufficient proof.[3] Moreover, they are not to be based on mere presumption.[4]

Petitioner will never know what caused the Court to summarily overrule its findings of fact without any evidence to support such action and order Pasquo Podeschi to be committed to jail.

The Court observed that it had noted "animosity" towards the Union in its original decision. The "animosity" noted by the Court in that decision is pinpointed to a time in 1962, which preceded the original election some nine or ten months prior to the making of the offers of reinstatement. (345 F. 2d 494, 497.) That Court I am sure was aware, as we all are, of the fact that animosity which may have been found to exist nine or ten months previously cannot be presumed to have been carried over *ad infinitum*.[5] The Court likewise must have been aware, as I am sure we all are, that a presumption must disappear in the face of contrary evidence. Such contrary evidence not only existed, but was sufficiently preponderant that the Court's own trier of fact found:

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2. *Terminal R. Ass'n* v. *United States*, 266 U. S. 17 (1924).

3. *Maggio* v. *Zeitz*, 333 U. S. 56 (1948).

4. Cf., Opinion of Mr. Justice Black. Wherein he said:

"I am unwilling to agree to application of res judicata that results in sending people to jail for (civil) content of court upon a measure of proof substantally the same as that which would support the rendition of a civil judgment for the plantiff" (p. 79).

5. In a recent case the Court of Appeals for the Seventh Circuit refused to presume a carryover of one month in a similar case. (*N. L. R. B.* v. *National Food Stores, Inc.*, 332 F. 2d 249 (1965).) The Court said: "The fact that Respondent was found guilty of an unfair labor practice . . . furnishes no basis for the contention it did not act in good faith." *Id.*, at 254. Cf., also *N. L. R. B.* v. *River Togs, Inc.*, 382 F. 2d 198, 206-07 (2nd Cir. 1967); *Peoples Drug Store, Inc.* v. *NLRB*, 375 F. 2d 551, 556-7 (6th Cr. 1967).

"M. That the management of My Store, Inc. held no bias nor animosity against the strikers."

We also find a complete lack of candor on the part of the Board in stating the factual situations existing in *Southwestern Pipe, Inc.*, 179 NLRB 364 and *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398. As pointed out in our petition (page 16), the employer in both cases was guilty of practically every unfair labor practice in the book—union animus, intimidation, threats, racial discrimnation, etc., etc. Moreover, in both cases there is a specific finding that the offers of reinstatement were in themselves discriminatory and in violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. It requires more than clever footnotes and parenthetical distinguishing remarks to sweep these blatant and obvious facts "under the rug." Pasquo Podeschi was denied the benefit of the holdings in *South Western Pipe* and in *O'Daniel Oldsmobile* for one reason alone, and that was the prior holding of the Court of Appeals that he had "wilfully, contumaciously and with knowledge" violated a decree of that Court entered in 1965 in making of the 1963 offers.

Footnote 5 of our Petition effectively answers the argument contained on page 3 of the Board's Memorandum regarding the time limits allowed for responding to the offers of reinstatement. The Board's argument is footnoted to two Board decisions (*Betts Baking Co.* and *Harrah's Club*) which were both denied enforcement in the Courts. (Cf., Petition, p. 12, footnote 5.) Moreover, the Court of Appeals in its orders entered in 1968 never at any time made any reference to length of time for reply as being a factor in its decision. When the Court finally found this to be a factor in its opinion of September 14, 1972 (Petition, Exhibit E), it makes a misstatement which is quoted in the Board's response to the Petition that the offers of reinstatement "required a response within one day." The time for re-

sponse varied between two and five days, and is to be distinguished from the cases cited by the Board (which were denied enforcement), and in fact the *O'Daniel Oldsmobile* case where only a very few days were allowed for reporting back to work as distinguished from notifying the company. In *O'Daniel* the Board found that a three-day period allowed from the mailing of the notice to reporting to work was reasonable and cut off back pay.

One more issue involved in footnote 3 of the Board's responsive Memorandum (page 4) requires comment. This footnote states that Petitioner could have appealed the contempt citation in 1968, and is now precluded.

It is a well settled rule that a civil contempt issued against a party litigant in the course of pending proceedings is not a final order subject to appeal.[6] It is equally well settled that purging of a civil contempt in order to stay out of jail does not amount to a waiver of the right to appeal or to a confession of guilt.[7]

It should be kept in mind that the Court of Appeals' order of June 14, 1968 (Exhibit C Petition, pp. A10-11), which temporarily rescued Podeschi from "durance vile," did not conclude the matter. After remanding the case to the Board, the Court retained jurisdiction "for further appropriate proceedings in this cause" and when it entered its final judgment it also issued another "Adjudication and Order on Civil Contempt" (Petition Exhibit G, p. A31, et seq.). There can be no doubt therefore that the 1968 contempt order was one issued in the course of pending proceedings and was not a final order subject to appeal. This appeal is taken from the final judgment and the final adjudication and order on civil contempt.

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6. *Fox* v. *Capital Co.*, 299 U. S. 105 (1936); *Duell* v. *Duell*, 178 F. 2d 682 (D. C. 1949); 33 ALR 3d, 448, at 554, and cases therein cited.

7. *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); 33 ALR 3d 448 at 561, and cases therein cited.

CONCLUSION.

It is submitted that the procedures and orders targeted at Pasquo Podeschi by both the National Labor Relations Board and the U. S. Court of Appeals in this case are indefensible. He is accused of "animosity" which without any evidence to support it was presumed to continue from the time at the end of the year 1962 when he interrogated some employees about Union affiliations. Thereafter, as was said previously, Podeschi has been "meek as a mouse." Nevertheless, for the past ten years he has been exposed to a vendetta which surpasses all understanding. Podeschi has effectively been denied the due process of law which he is entitled to expect from his government. He has had a raw deal—the rawest of the raw.

Respectfully submitted,

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